Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

EDGAR A. GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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112 pp

QUESTIONS PRESENTED

The country of Canada extradited Petitioner to the United States to face charges stemming from drug trafficking and a homicide in the State of Florida. Petitioner faced a homicide charge in Florida State Court and drug and firearms charges in the Federal District Court for the Northern District of Florida. The federal court departed upward from the Federal Sentencing Guidelines range to punish Petitioner for the homicide offense which was not charged in federal court. The court also determined sentence based on drug quantities that were not proved in the guilt-innocence phase of the proceedings, including charges stemming from alleged drug activity in Louisiana. The first issue is whether the Fifth and Sixth Amendment protections outlined in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), are violated by two aspects of the sentencing: (1) the upward departure to punish Petitioner for the uncharged homicide offense, and (2) the consideration of drug quantities involved in uncharged offenses in Louisiana. A second issue raised in this Petition is whether Petitioner's sentence violates the doctrine of specialty of the Extradition Treaty Between the United States and Canada by punishing him for the uncharged homicide and the uncharged Louisiana drug offenses.

PARTIES TO PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Edgar Arnold Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion in *United States v. Garcia,* 208 F.3d 1258 (11th Cir. 2000) is printed in the Appendix ("App.") at 1. The order denying the petitions for rehearing and suggestion for rehearing en banc is at App. 22. The unreported 1997 judgment of the district court is at App. 10.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was rendered on April 10, 2000 (App. 1). Petitioner timely filed a motion for rehearing on the decision of the Court of Appeals, which was denied on June 14, 2000 (App. 22). Petitioner timely filed a motion for reconsideration en banc, which was denied on June 14, 2000 (App. 22).

The jurisdiction of this Court is invoked under 42 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES

Provisions of the following are in the Appendix, at 24-71: U.S. Const., Amendments V, VI; Extradition Treaty

Between the United States and Canada; Canada-United States Protocol Amending The Treaty on Extradition, 18 U.S.C. § 2, 18 U.S.C. § 924(c), 21 U.S.C. § 841, 21 U.S.C. § 846; Letter of Lisa C. Burnett, U.S. Department of Justice.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The three-count indictment was filed in the Federal District Court for the Northern District of Florida on July 15, 1992. Petitioner was charged with the following: (1) Count I – between January 1, 1990 and February 28, 1991, conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841 and 846; (2) Count II – between December 1, 1990 and December 17, 1990, possessing with intent to distribute marijuana, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; and (3) Count 3 – on or about February 20, 1991, using and carrying a firearm during, and in relation to, a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Additionally, the State of Florida named Petitioner in an indictment charging First Degree Murder in connection with the death of Marty Cryer.

As Petitioner had taken up residence in Canada, he was party to extradition proceedings, which took the better part of five years. On May 6, 1997, pursuant to the extradition, Petitioner was turned over to the United States Marshal Service.

On July 25, 1997, Petitioner, pursuant to a written plea agreement, entered a plea of guilty as to Counts I

and III of the indictment. The matter was then bound over for sentencing. Prior to the sentencing hearing, Petitioner filed a letter with the court disputing several factual statements in the "Factual Basis for Plea" document that had been prepared by the prosecuting attorney and his defense attorney.

In September of 1997, Petitioner reached an agreement with the State of Florida in which Petitioner would plead guilty to Second Degree Murder and receive a seventeen-year sentence. Said sentence was recommended to run concurrently to the sentence imposed in the federal court.

On October 3, 1997, Petitioner appeared for sentencing in the federal court. After hearing arguments from both parties as to relevant sentencing factors, the district court imposed a total term of 360 months imprisonment, to be followed by four years of supervised release.

On October 9, 1997, Petitioner appeared in the Florida State Court and pled guilty to Second Degree Murder, as had been previously negotiated. He was sentenced to an agreed seventeen-year term to run concurrently with the federal term.

Petitioner appealed his federal sentence on several grounds. In addition, although appellate counsel did not raise the voluntariness of the plea issue in the appeal brief, counsel did file a motion to adopt Petitioner's pro-se supplemental appeal brief. The pro-se brief raised two issues: (1) whether Petitioner's plea was unknowingly made and involuntarily entered into as a result of force, threats, or promises; and (2) whether Petitioner was sentenced on the basis of erroneous information and false assumptions. The Eleventh Circuit refused Petitioner's

motions to adopt his supplemental appeal brief and exhibits. The issues raised in the supplemental brief are not raised in this Petition.

(ii) Statement of Facts

The Petitioner's charges, and the resulting sentences, stem from a 1991 investigation into Petitioner's drug-trafficking activities. The investigation revealed that Petitioner and several others were responsible for the shipment of marijuana from Texas to Florida to a group of individuals headed by Marty Cryer.

In December of 1990, Marty Cryer was said to have taken a shipment of marijuana without payment (approximately $100,000). In February of 1991, Petitioner dispatched individuals to Florida to search for Cryer to seek either the return of the marijuana or payment. One of the individuals grew weary of the search for Cryer and returned to Texas. Petitioner flew to Florida to replace the individual.

Cryer was located at a hotel in Chiefland, Florida. The three then purchased gloves, a baseball bat, and duct tape, all of which were to be used to restrain and persuade Cryer to pay his debt should he become unmanageable. They carried guns for their own protection as well (Cryer had a reputation for violence and was believed to have committed drug-related murders).

Cryer was confronted the next day at the hotel. While Petitioner and another individual took Cryer into one room, another associate (Cryer's adoptive mother) took Cryer's wife and child into another hotel room, next

door.[1] Cryer advised Petitioner that he did not have the money to pay the debt and that he had no intention of paying it in the future. Cryer then appeared to be reaching for something, and Petitioner thought he might have a weapon. In a panicked fear for his life, Petitioner fired multiple gun shots at Cryer, causing his death. Petitioner and his two associates, having no escape plans prepared, fled from the hotel, buried the guns, and proceeded to a friend's home in Lakeland, Florida. Petitioner then traveled by bus to Texas, where he stayed for about four weeks before leaving the country.

Petitioner made his way to Canada where he lived in a religious community near Toronto under an assumed name. On June 17, 1992, approximately 15 months later, Royal Canadian Mounted Police located Petitioner who was then peacefully apprehended.

The United States subsequently requested the arrest and extradition of Petitioner through Diplomatic Note No. 219 transmitted to Canadian officials. This official request was accompanied by copies of the indictments from the Northern District of Florida and the State of Florida.[2]

Petitioner initially challenged the extradition, primarily contesting the possibility of the death penalty in the State of Florida. During the course of the extradition proceedings, Petitioner and the State of Florida reached a plea agreement on the homicide, with an assurance that

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[1] Petitioner and his associates happened by chance to have been assigned a room next door to Cryer's room.

[2] The Extradition Request Packet has been lodged with the Clerk of the Court.

the federal charges would be dismissed. The federal prosecutor refused to accept the proposed agreement. Concerned by the federal prosecutor's unwillingness to entertain negotiations with Petitioner's Canadian defense counsel, Petitioner amended his extradition argument to include the possibility that the federal government might seek the death penalty for the federal offenses. The Canadian Supreme Court rejected this claim, finding it not credible that the United States would violate the extradition treaty by prosecuting Petitioner for homicide and subjecting him to capital punishment when that offense was not contained in the extradition request.

The extradition process spanned approximately five years. On May 6, 1997, Petitioner was extradited to the United States from Canada pursuant to the Treaty on Extradition Between Canada and the United States. (App. 25)

On July 25, 1997, Petitioner, pursuant to a written plea agreement, entered a plea of guilty as to Counts I and III of the federal indictment. Petitioner also signed a detailed "Factual Basis for Plea" which set out the circumstances and facts surrounding the drug activity and the shooting of Cryer. After the plea was entered, the matter was bound over for sentencing.[3]

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[3] Prior to sentencing, Petitioner made several attempts to have counsel notify the court of the situation regarding the inaccurate Factual Basis for Plea. When counsel refused, Petitioner submitted pro-se a letter explaining the incorrect statements and explaining that Petitioner had signed the Factual Basis for Plea under pressure from counsel. The court took no notice of the pro-se communications.

In September of 1997, Petitioner reached an agreement with the State of Florida regarding the homicide charge in the shooting of Marty Cryer. Petitioner agreed to plead guilty to Second Degree Murder and receive a seventeen-year sentence which was recommended to run concurrently to the sentence imposed by the federal court.

On October 3, 1997, Petitioner appeared for sentencing in federal district court. Petitioner offered objections to the Probation Officer's recommendations as to several matters, two of which are raised in this Petition: (1) use of drug amounts attributable to activity between Texas and Louisiana in calculating the sentence, as that activity was not charged in the indictment nor disclosed to the Canadian government; and (2) the reliance on the shooting of Cryer for imposing an upward departure, as such reliance on conduct that was not charged in the federal indictment or proved in the guilt-innocence stage, nor had it been adjudicated in the State Court at the time of sentencing in federal court. The Petitioner made other objections regarding the application of various Federal Sentencing Guidelines provisions, including upward adjustments for playing a leadership role in the offense and obstruction of justice, and a denial of a reduction for acceptance of responsibility.

At the sentencing hearing, both parties presented their arguments to the court with regard to the Petitioner's objections to the sentencing factors. The Petitioner offered the expert testimony of Dean William Schabas, a renown Canadian legal scholar, regarding the Extradition Treaty Between the United States and Canada and the application of the specialty doctrine. Dean Schabas would also have testified that the sentencing

practices of punishing for uncharged conduct and punishing for conduct that is also being punished in another jurisdiction violate Canadian constitutional law. The district court refused to hear Dean Schabas's testimony.

The district court rejected all of Petitioner's objections. The offense level was set at 34 and a criminal history category of I, which would yield a sentence range of 151 to 188 months. This offense level was two points higher than it would have been without consideration of drug quantities attributable to Petitioner's alleged activity between Texas and Louisiana.

In addition to whatever sentence the court imposed for the drug offenses, the Petitioner would be required to serve an additional 60 months for the § 924(c) firearms charge. Thus, the total sentence range specified under the Guidelines (including the Louisiana drug quantities) was 211 to 248 months. (Without the Louisiana drug quantities, the total sentencing range would have been 181-211 months.)

The district court imposed an upward departure of five offense levels in order to punish Petitioner for the shooting of Cryer. Thus, Petitioner's offense level was raised to 39, which yielded a range of 262 to 327 months, plus the consecutive 60 months for the § 924(c) charge. The court sentenced Petitioner to a total of 360 months, 300 months for the drug charges and the 60 months for the gun possession charge. Thus, Petitioner's sentence was increased from a maximum of 248 months under the Guidelines (including the Louisiana drug quantities) to 360 months on account of the upward departure to account for the homicide. Not counting the Louisiana

drug quantities, the maximum would have been 211 months, as compared to the 360 months actually imposed.

Petitioner pled guilty to second degree murder in the State Court the following week.

SUMMARY OF ARGUMENT

The Petitioner was extradited from Canada pursuant to a request by the United States made through Diplomatic Note No. 219 and accompanying documents. (See Lodgings.) In Diplomatic Note No. 219, the Canadian Government was informed that Petitioner was facing four charges: (1) in federal court, two charges of drug trafficking between Texas and Florida and a related weapons charge, and (2) a murder charge in the State of Florida.

The federal district court determined which statutory range applied to the Petitioner based on proof at sentencing of drug quantities that were the result of activity in Louisiana. The Louisiana drug offenses were neither included in the indictment nor listed in the extradition request. The use of the Louisiana drug quantities raised the Petitioner's base offense level by two levels. The court also departed upward by five more levels to punish Petitioner for the homicide offense that was not included in the indictment (and which was not a federal offense) and which had not yet resulted in a conviction in the State court. The Canadian government had not been informed that Petitioner would be punished for homicide in federal court.

The court determined the applicable statutory range based on its determination of the drug quantities upon

proof by a preponderance of the evidence. The applicable range determined by the court was 211-248 months including the Louisiana drug quantities. (It would have been 181-211 months without the Louisiana drug quantities.) The court then departed upward by five levels, adding 112 months more than the maximum allowable under the Federal Sentencing Guidelines for the offenses of conviction, even including the uncharged Louisiana quantities. This represents a 45 percent increase in Petitioner's sentence. In effect, Petitioner's sentence was increased from the 20-year sentence mandated for the offenses of conviction (even including the Louisiana quantities) to 30 years on account of the court's finding that he was guilty of murder.[4]

The practices of relying on drug offenses as well as on drug quantities that are neither charged in the indictment nor proved at the guilt-innocence phase are consistent with the typically daily practice of federal courts under the Guidelines. Similarly, the upward departure to punish for an uncharged homicide is a common practice in federal courts. These practices are inconsistent, however, with the due process clause of the Fifth Amendment, the Sixth Amendment rights to a jury trial and to notice of criminal charges by indictment.

In upholding the sentence, the Eleventh Circuit has decided an important federal question in a way that

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[4] The district court did not specify the degree of murder it found and took no notice of mitigating circumstances that might have supported a finding of manslaughter or self-defense, such as the victim's reputation for violence, that the victim had a gun, and that the victim appeared to reach for a weapon.

conflicts with this Court's decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). *Apprendi* held, "Other than the fact of a prior conviction, any fact that increases the maximum penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2363.

This Court should clarify that sentencing ranges applicable to the "base offense levels" for the offenses of conviction under the Federal Sentencing Guidelines are legally-mandated minimums and maximums. To the extent that the Guidelines permit courts to depart upward from the Guidelines, or to increase the offense level under the Guidelines, in order to consider other uncharged offenses, the Guidelines permit punishment for uncharged offenses in violation of the Fifth Amendment's due process clause, and the Sixth Amendment rights to a jury trial and to notice of criminal charges by indictment. Given the vast numbers of sentences in which federal courts regularly depart from the required sentence on the basis of summary findings that offenders are guilty of other uncharged offenses, it is important for this Court to determine whether this sentencing practice violates the constitutional protections delineated in *Apprendi*.

Additionally, Petitioner argues that his sentence violates the doctrine of specialty which is incorporated into the Extradition Treaty Between the United States and Canada. The United States sentenced Petitioner on the basis of uncharged offenses and also for an offense that was punished both in State and federal courts. Under Canadian law, the use of uncharged offenses is clearly unconstitutional. The punishment of an individual for the same offense in two jurisdictions is also unconstitutional

in Canada. In requesting extradition, Canada was not informed that the United States intended to punish Petitioner in this manner, a manner clearly inconsistent with Canadian law. Thus, the United States should assume that Canada would not have consented to the extradition and would view the sentence as a violation of the treaty.

The Eleventh Circuit held that the determination of whether these sentencing practices constitute punishment for offenses not included in the extradition agreement, thus violating the doctrine of specialty, is to be "resolved in accordance with the law of the United States." (App. 3-4) The court stated that "the law and position of the surrendering state . . . is not controlling." (App. 3-4) The Eleventh Circuit's decision conflicts with those of every other Circuit Court that has addressed the issue. Every other Circuit Court has held that the test should be whether the surrendering country would consider the offenses to be independent from those for which he was extradited. This Court should set aside the Eleventh Circuit's sole reliance on American law in interpreting the Extradition Treaty and embrace the traditional analysis of the specialty doctrine which grants substantial deference to the position and law of the surrendering state. Such a rule is important to maintain harmonious international relations with Canada and the numerous other countries with whom the United States has signed Extradition Treaties. The Court should remand for a proper determination of the law and position of the country of Canada regarding the specialty doctrine as applied to the practice of relying on uncharged drug offenses and an uncharged homicide offense in the sentencing of Petitioner under the Federal Sentencing Guidelines.

Moreover, regardless of whether one looks to the law and position of the requesting state, as the Eleventh Circuit held, if this Court finds that Petitioner's sentence violates the protections outlined in *Apprendi*, then the sentence would still violate the extradition agreement. Every extradition agreement contemplates that the surrendered person will be accorded the due process protections available in the requesting country.

REASONS FOR GRANTING WRIT

A. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *APPRENDI V. NEW JERSEY*, 120 S.Ct. 2348 (2000), WHICH DICTATES THE CONCLUSION THAT UNCHARGED OFFENSES AND DRUG QUANTITIES THAT INCREASE THE MAXIMUM SENTENCE APPLICABLE UNDER THE FEDERAL SENTENCING GUIDELINES ARE SEPARATE OFFENSES THAT MUST BE CHARGED IN THE INDICTMENT AND TRIED BEFORE A JURY

The writ should be granted because the Eleventh Circuit decision conflicts with the interpretative rules regarding Fifth and Sixth Amendment rights set forth in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), which was decided after the Eleventh Circuit rendered its decision.[5]

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[5] Petitioner is entitled to retroactive application of *Apprendi* under the well-settled legal principle reaffirmed in Powell v. Nevada, 511 U.S. 80 (1994): " '[A] . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state and federal, . . . not yet final.' " *Powell*, 511 U.S., at 80 (citation omitted).

Apprendi held that any fact other than prior conviction that increases the maximum penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 2362-63. The Eleventh Circuit rejected Petitioner's challenge to the district court's reliance on the uncharged homicide and drug offenses as the basis for an upward departure, finding that punishing him for uncharged offenses "is legally and conceptually a part of the punishment for the inducted [sic] crimes . . . " (App. 4) Because of the large number of federal sentences that are based on proof of uncharged offenses, this Court should address the applicability of the Fifth and Sixth Amendment to this sentencing practice under the Federal Sentencing Guidelines.[6]

(i) The Upward Departure for the Uncharged Homicide

Under the Federal Sentencing Guidelines, the applicable sentencing range for a particular federal offense is determined by calculating a score for the offense and a score for the offender's criminal history. Stated in a range of months of incarceration, the sentencing ranges drastically limit the court's discretion in sentencing the offender and make statutory ranges almost irrelevant. As Justice Scalia has written: "[The Federal Sentencing

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[6] The Petitioner does not here raise the claim that the sentencing practices he challenges violate the Double Jeopardy Clause. Therefore, this Court's decisions in Witte v. United States, 515 U.S. 389 (1995) and United States v. Watts, 519 U.S. 148 (1997), are not relevant as those decisions rested firmly on a reading of the Double Jeopardy Clause and neither made any indication of broader applicability.

Guidelines] have the force and effect of laws prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed." *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., concurring). The Guidelines, thus, create a determinate sentencing regime that has been superimposed over the previous indeterminate regime, creating new sentencing minimums and maximums that are legally binding on courts.

Statutory ranges become relevant in only a few circumstances, such as when the sentencing court decides that the facts surrounding the commission of an offense justify a "departure" either upward or downward. The Guidelines allow courts to "depart" outside the prescribed sentencing ranges "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ' " U.S.S.G. § 5K2.0. Granting courts the discretion to depart to consider extraordinary "aggravating circumstances" seems both unobjectionable and wise, but the following provision goes farther than that.

Section 5K2.1 permits a court also to consider other separate offenses that were not charged in the indictment and proven at trial, specifically murder. Indeed, under § 5K2.1, courts are not only permitted to sentence an offender for an uncharged murder, they are *encouraged* to depart from the mandatory sentencing range to punish offenders for murder as a "sentencing factor." Courts may then choose a sentence anywhere within the statutory range. Section 5K2.1 reads:

Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflect the risk of personal injury. . . .

Clearly, the guideline instructs courts to go outside the otherwise-required sentencing range in order to punish for a separate homicide offense. The courts are further instructed that they should make the fine distinction regarding the "level of homicide" by determining the "defendant's state of mind" and "degree of planning or preparation." Thus, courts are encouraged to make a finding of a defendant's guilt of homicide – including the specific level of homicide – without having provided the defendant with notice of this charge in the indictment from the grand jury, without the benefit of a jury trial and verdict, and without the constitutional protections available to an accused person at trial. The lack of procedural protections in this sentencing practice make the truth-finding enterprise highly suspect. Also, noticeably absent

in this provision is any reference to mitigating circumstances.

In this case, for example, the district court, in sentencing Petitioner for drug and firearms charges, departed upward from the mandatory Guidelines range by five levels because the court found Petitioner to be guilty of murder without specifying what level of homicide. The court made a determination of the offender's *mens rea* in committing the homicide without the benefit of witness testimony or even of a thorough plea allocution. Such fine determinations are often difficult to make even after a full-blown trial in which witnesses may testify and be cross-examined. As *Apprendi* states: "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.' " *Apprendi,* 120 S.Ct. at 2364.

It is clear that under this Court's decision in *Apprendi* homicide cannot be treated as a "sentencing factor" that merely reflects the *manner* in which the drug trafficking offenses were committed. Homicide is a separate offense from the drug trafficking offenses and firearms possession charges of which Petitioner was convicted. Far from being a mere "sentencing factor," homicide is considered one of the most serious offenses a person can commit.

McMillan v. Pennsylvania, 477 U.S. 79 (1986), refined our understanding of "sentencing factors" which may be found by a court alone under a preponderance of the evidence standard and "elements of the offense of conviction" which must be charged in the indictment and proven to a finder of fact beyond a reasonable doubt. In *McMillan,* the visible possession of a firearm was found to be properly treated as a sentencing factor as this factor

did not trigger a potential sentence outside the range otherwise prescribed. *Id.* at 87-88.

McMillan identifies several factors that may guide our understanding of "the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases." *Id.* at 86. A state may not discard the presumption of innocence, for example, nor relieve the prosecution of its burden of proving every element of the offense beyond a reasonable doubt. *Id.* at 86-87. It must also not "be tailored to permit a [sentencing fact] to be a tail which wags the dog of the substantive offense." *Id.* at 88.

Apprendi presented for the first time a situation in which the factor designated as a sentencing factor did indeed trigger a sentence outside the range otherwise prescribed.[7] *Id.* at 2365. *Apprendi* held that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 2362-63. The decision recognizes that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Id.* at 2359 n. 10.

In this case, Petitioner's sentence was enhanced by approximately 10 years on the basis of the upward departure, from 20 years to 30 years. This Court stated in

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[7] In contrast, Jones v. United States, 526 U.S. 227 (1999), Castillo v. United States, 120 S.Ct. 2090 (2000), and Almendarez-Torres v. United States, 523 U.S. 224 (1998), were all decided on the basis of statutory interpretation. In each instance, the statutes as interpreted did not run afoul of any constitutional requirements.

Apprendi: "[I]t can hardly be said that the potential doubling of one's sentence – from 10 to 20 years – has no more than a nominal effect . . . It is appropriately characterized as a 'tail which wags the dog of the substantive offense.' " *Apprendi*, 120 S.Ct., at 2365 (quoting *McMillan*, 477 U.S., at 88). Likewise, in this case the 45% increase, which totals to the same 10-year increase as that in *Apprendi*, is also hardly a "nominal effect." Petitioner was accorded full constitutional protections during the guilt-innocence phase on the charged offenses, but the departure power under the Guidelines permits a 10-year increase in the sentence otherwise required. Petitioner was exposed to a drastic increase in this prescribed range on the basis of an offense not charged in the indictment. This increase is imposed on the basis of a finding made by the judge by a preponderance of the evidence, without the right to a jury trial. Such a practice is surely in conflict with the principles articulated in *Apprendi* and *McMillan*.

While not dispositive, the recent decision of *Almendarez-Torres* is also nonetheless instructive. The holding in *Almendarez-Torres* rested on the finding that the prior offense, which raised the maximum penalty to which the defendant was exposed, was probative of his recidivism, a traditional sentencing factor. 523 U.S., at 2361-62. *Apprendi* explains the distinction between use of prior convictions and other "facts" that raise the maximum penalty:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find

> the required fact under a lesser standard of proof. 120 U.S., at 2366.

The use of uncharged offenses stands in marked contrast. None of the procedural safeguards available to one formally charged with a crime were available to Petitioner.

Moreover, recidivism "does not relate to the commission of the offense" itself, but to a past crime. *Id.* Whereas, the uncharged homicide attributed to the Petitioner does relate to the offense itself. The uncharged homicide was not merely a "fact" bearing on the seriousness of the offense of conviction, however. The homicide is a cluster of facts – an act, a result, and a specific mens rea – that can only be regarded as a separate offense altogether.

This Court's decision in *Williams v. New York*, 337 U.S. 241 (1949), is distinguishable because in *Williams* the trial court was faced with the decision of whether to sentence Williams to life or death for a homicide, either of which might have been an appropriate sentence depending on other background factors regarding Williams' future dangerousness and the circumstances of the offense of conviction. This Court upheld the trial court's consideration of other uncharged offenses to determine his potential for rehabilitation, as was the principle goal of the indeterminate sentencing model. 337 U.S., at 249 ("[A] strong motivating force for the changes [to adopt indeterminate sentencing] has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship."). In determining that Williams did not deserve the court's mercy, the court was not punishing Williams for the prior offenses

but making a determination of his character and potential for rehabilitation.

The Federal Sentencing Guidelines were designed specifically in response to criticisms of this indeterminate model of sentencing. They narrowly constrain a court's discretion to adjust sentences based on findings regarding the offender's potential for rehabilitation, permitting adjustments only within the narrow ranges determined by reference to the "base offense level" for a which a person is held accountable and his "criminal history" score based only on past convictions.[8] Thus, by increasing the "base offense level" through upward departures for uncharged offenses the court sets the punishment range for the "offense" for which one is punished; uncharged offenses are not being considered as part of an offender's criminal history in order to assess his potential for rehabilitation or his character as was true in *Williams*. Under the Federal Sentencing Guidelines, a judge's discretion to consider factors bearing on a person's potential to be rehabilitated is narrowly confined; this factor can only be considered when determining sentence within the narrow sentencing range.

The time is ripe for a ruling on the constitutionality of a sentencing practice that has evoked considerable unrest among the Circuit Courts. For example, the First

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[8] *See* U.S.S.G. § 5H, Introductory Commentary. This section of the Guidelines addresses "specific offender characteristics" – such as education, employment, and family ties – that have traditionally been considered as relevant to an offender's potential for rehabilitation. The introductory commentary states that such factors may be considered to determine "the sentence within the applicable guideline range . . . "

Circuit, in vacating an upward departure in a similar case on Due Process grounds, stated:

> A charge of murder represents the archetype of conduct that 'has historically been treated in the Anglo-American legal tradition as requiring proof beyond a reasonable doubt.' Thus, a rule structure that bars conviction of a firearms charge except on proof beyond a reasonable doubt, but then permits imposition of a life sentence upon proof of a murder by a preponderance of the evidence attaches, in effect, the lesser procedural protections to the issue that would naturally be viewed as having the greater significance.

United States v. Lombard, 72 F.3d 170, 177 (1st Cir. 1995); *cf. United States v. Kikamura*, 918 F.2d 1084 (3d Cir. 1990) (requiring greater procedural protections involving the standard of proof and admissibility of evidence for departures that are so great that they become the "tail that wags the dog" of the substantive offense).

This Court should grant the writ to make clear that *Apprendi* forbids the practice of departing upwards from the prescribed sentencing range for an offense on the basis of an uncharged and previously unadjudicated offense.

(ii) The Uncharged Louisiana Drug Offenses

In this case, Petitioner was charged in the indictment with the charge, under 21 U.S.C. §§ 841 and 846, of conspiracy to possess with intent to distribute marijuana. Petitioner pled guilty to the conspiracy charge. At sentencing, the court determined as a "sentencing fact" that

Petitioner had conspired to possess between 400 and 700 kilograms of marijuana. This calculation included quantities of marijuana and cocaine related to the separate offenses occurring in Louisiana.

Petitioner was alleged to have had separate agreements with different groups of buyers of marijuana in Louisiana and Florida. The activity in Louisiana took place prior to the transactions with the group in Florida. The two schemes involved entirely different sets of participants, who had no relation to each other whatsoever, with the exception of Petitioner's accomplice, David Alley, who assisted Petitioner.

The court found that the Louisiana charges were "Relevant Conduct" under § 1B1.3 of the Guidelines. The total amount of marijuana attributed to Petitioner based on the Louisiana charges was approximately 182 kilograms. Adding this quantity to the 317.52 kilograms for the Florida offenses, the court concluded that Petitioner had possessed marijuana in the amount of between 400 and 700 kilograms, yielding a base offense of 28. Had the court only considered the Florida drug charges, the total quantity would have been within the 100 to 400 kilogram range, which would yield a base offense level of 26. If this Court grants this Petition, Petitioner would request permission fully to brief the issue of whether the Louisiana conduct was properly found to be relevant conduct. Petitioner would argue that the court's finding violates this Court's decision in *Blumenthal v. United States*, 322 U.S. 539 (1947).

B. THIS COURT SHOULD RESOLVE THE CONFLICT ON WHETHER THE LAW OF THE REQUESTING COUNTRY OR OF THE SURRENDERING COUNTRY GOVERNS IN DETERMINING WHETHER PUNISHMENT FOR AN OFFENSE INDEPENDENT OF THE EXTRADITION AGREEMENT HAS OCCURRED

The United States government requested extradition of Petitioner from Canada by Diplomatic Note No. 219, informing the Canadian government that he faced marijuana charges and a firearm charge in federal court and a homicide charge in Florida state court. (See Lodgings) Following lengthy judicial proceedings, Canada agreed to extradite Petitioner on the charges stated in the request for extradition. The Canadian courts agreed to extradite Petitioner after the State of Florida had sent assurances that Petitioner would not be subject to capital punishment. The Canadian courts also rejected Petitioner's claim that the federal government might seek to impose the death penalty for the drug-related death of Marty Cryer. It was the clear understanding of the Canadian courts that Petitioner would only be charged and punished for drug trafficking and a firearms charge in federal court and that punishment for the homicide would occur in State court as set forth in the terms of the extradition order.

The district court, over the objections of defense counsel, imposed a dramatic upward departure to punish Petitioner for the homicide. In setting Petitioner's base offense level, the court also relied on uncharged drug offenses stemming from allegations of drug offenses in Louisiana. The court refused to permit testimony from Dean William Schabas, a renowned scholar on Canadian

international law and criminal law. Dean Schabas would have testified that the use of relevant conduct to punish Petitioner for the uncharged homicide offense would violate the specialty doctrine incorporated in the Extradition Treaty. He would have explained that the practice of punishing a person twice for the same offense, once in State court and once in federal court, would violate the Double Jeopardy provision of the Canadian constitution. Dean Schabas would further have explained that the practice of punishing a person based on other uncharged offenses is not permitted in Canada. Petitioner argues that the Canadian courts would not have permitted his extradition had they been apprised that the federal court would engage in these sentencing practices. Thus, the sentence violates the doctrine of specialty of the Extradition Treaty Between the United States and Canada.

Article 12 of the Extradition Treaty states that "a person extradited under the present Treaty shall not be detained, tried *or punished* in the territory of the requesting state for an offense other than that for which extradition has been granted. . . . " (App. 34) This Court's landmark decision in *United States v. Rauscher*, 119 U.S. 407, 429-30 (1886), declares that "the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty." This "doctrine of specialty" has been extended to bar prosecutions for crimes for which, for whatever reason, extradition was not granted.

Our courts recognize that the importance of the doctrine is to further harmonious international relations and to protect each country's citizens abroad from indiscriminate prosecution and punishment. Governments take

seriously their right to protect persons who have sought asylum in their country from indiscriminate prosecution and punishment abroad. How seriously countries take extradition agreements is demonstrated by the fact that so many countries impose limitations on their extradition agreements, often refusing to extradite on certain charges or limiting the extent of punishment that may be imposed.[9] As was true in Petitioner's case, the Canadian courts frequently allow extradition to the United States only after obtaining assurances that capital punishment will not be sought because under Canadian law capital punishment is unconstitutional. Thus, the doctrine of specialty protects the extraditing country against abuse of its discretionary act of extradition. Countries can rest assured that when they relinquish a person through the extradition process the extradited person will be punished only for the offenses for which extradition was granted.

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[9] See, e.g., United States v. Rauscher, 119 U.S. 407 (1886) (Great Britain had previously refused to surrender a fugitive within its borders absent a guarantee from the United States that he would not be tried for an offense other than that for which extradited); United States v. LeBaron, 156 F.3d 621, 626-27 (5th Cir. 1998), *cert. denied*, 525 U.S. 1162 (1999) (Mexican government objected to extradition on certain charges); United States v. Khan, 993 F.2d 1368, 1375 (9th Cir. 1993) (Pakistan did not explicitly allow extradition on one count); United States v. Gallo-Chamorro, 48 F.3d 502, 503 (11th Cir. 1995) (Colombia denied extradition on all counts relating to aiding and abetting as that form of liability does not exist in Colombia and limited imprisonment to 30 years); United States v. Jurado-Rodriguez, 907 F.Supp. 568, 573 (E.D.N.Y. 1995) (Luxembourg would not permit defendants to be prosecuted for offenses based on same facts as already prosecuted in Luxembourg).

To determine whether the doctrine of specialty has been violated in a particular case, the Circuit Courts have generally adopted a test akin to that articulated in the Second Circuit's decision in *United States v. Paroutian*: "the test whether trial is . . . whether the extraditing country would consider the offense actually tried 'separate.' " *Paroutian*, 299 F.2d 486, 490-91 (2d Cir. 1962). This test, and several other variants, have typically looked to the charges and factual evidence provided to the surrendering country and then looked for a correspondence with the charges and factual evidence presented at trial.[10] If there was a correspondence between the charges and factual evidence, then the courts conclude that the surrendering country would not have found the specialty provision of the treaty to have been violated.

The Eleventh Circuit's decision in this case stands in marked contrast to the test typically applied. The Eleventh Circuit Court states that "[t]he question must be resolved in accordance with the law of the United States." (App. 3) Rather than acknowledge that principles of comity require our courts to ensure that the surrendering country does not view the prosecution as having violated the treaty, the Circuit Court states: "While the law and position of the surrendering state may be considered, it is not controlling." (App. 3-4)

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[10] See, e.g., United States v. LeBaron, 156 F.3d 621, 627 (5th Cir. 1998) (appropriate test is whether extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited); United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994) (same).

The Petitioner contends that the reliance on uncharged offenses to increase his base offense level under the Guidelines violates the doctrine of specialty. It does so in two ways. First, the reliance on the homicide in punishing Petitioner means that he received punishment twice for the same offense. While not a Double Jeopardy violation in this country, it would be considered a Double Jeopardy violation in Canada which does not recognize the dual sovereignty doctrine. Therefore, the United States should conclude that Canada would have refused extradition had it been informed that the United States intended to impose two punishments on Petitioner for the same offense. Second, Canadian law forbids the use of uncharged offenses in determining an offender's sentence. In this case, the reliance on uncharged offenses dramatically increased Petitioner's sentence above that which would have been required for the offenses of conviction.

Of significance in this case is the fact that the specialty provision in the extradition treaty with Canada specifically states that a person may not be "detained, tried *or punished*" for an offense other than that for which the surrendering country granted its consent. The case law interpreting the specialty doctrine focuses exclusively on whether a person is "tried" for the same offenses, but the language of the treaty contemplates that one might be punished for offenses even if not tried for them.

Of course, a party to a treaty may waive any objections alleging treaty violations. A person extradited under a treaty has standing to assert treaty obligations, but only in the absence of an express waiver of objections

by the surrendering country. In this case, there was no express, written waiver sent through diplomatic channels waiving objections to the sentencing practices at issue.[11] Thus, in order to give full respect to Canada's decision to extradite Petitioner, the courts below should have inquired into the Canadian law and position regarding the punishment of Petitioner for uncharged offenses.

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[11] When asylum states waive objections to treaty violations or clarify their positions on issues in extradition cases, they send formal, written statements, usually in the form of diplomatic notes issued by the equivalent of our Secretary of State. See, e.g., United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998) (diplomatic note clarifying Mexico's position); United States v. Tse, 135 F.3d 200, 204 (1st Cir. 1998) (dipolmatic note waiving objection); United States v. Riviere, 924 F.2d 1289, 1292 (3d Cir. 1991) (express written waiver by Attorney General and Minister of Legal Affairs of Republic of Dominicana); United States v. Diwan, 864 F.2d 715, 720-21 (11th Cir. 1989) (diplomatic note from Secretary of State of Great Britain waiving objections). United States v. Saccoccia, 58 F.3d 754, 768 (1st Cir. 1995), assessed the significance of oral statements by a Swiss official raising concerns about certain charges. The court dismissed the concerns as "informal fretting" that provided a "gossamer showing" regarding the Swiss position.

In this case, the prosecutor introduced a letter from a Department of Justice law enforcement official who had had a telephone conversation with a Canadian counterpart in law enforcement who was said to have stated "her opinion" that the sentencing practices did not violate the specialty doctrine. (App. 72-73) On the basis of this, the Eleventh Circuit states that "Canada was well aware of the additional conduct ascribed to defendant and has acquiesced to the procedure by which such conduct is considered in sentencing." (App. 72-73) The Eleventh Circuit is mistaken. It is simply not the case that Canada has consented to the sentencing practices at issue.

The Eleventh Circuit erroneously determined that the specialty doctrine issue should be determined solely by reference to American law and rejected any suggestion that the law of Canada had any importance in making the determination whether the treaty was violated.

This Court should hear this petition in order to resolve the conflict between the Eleventh Circuit's test and that of most other Circuit Courts regarding the appropriate test to determine whether the specialty doctrine has been violated. Moreover, even if this Court upholds the Eleventh Circuit's reading of the specialty doctrine, but also finds that Petitioner's sentence violates the protections outlined in *Apprendi*, then the sentence would still violate the extradition agreement because Canada would not have agreed to extradite the Petitioner had it known he would be subjected to sentencing in violation of the Constitution of the United States.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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(713) 743-2134
Counsel for Edgar A. Garcia

**Counsel of Record*

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3222

D.C. Docket No. 92-01027-CR-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(April 10, 2000)

Before EDMONDSON and CARNES, Circuit Judges, and WATSON*, Senior Judge.

WATSON, Senior Judge:

This appeal from a sentencing raises three issues; whether the sentencing violated the terms of the treaty under which defendant was extradited from Canada, whether the sentencing court erred in finding that the defendant had obstructed justice and finally, whether it erred in finding that defendant had not demonstrated acceptance of responsibility.

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* Honorable James L. Watson, Senior Judge, United States Court of International Trade, sitting by designation.

I. BACKGROUND

In the last half of 1990 the appellant, then located in Texas, organized the supply of marijuana to co-conspirators in Florida. One of the co-conspirators, Marty Cryer, appropriated an amount of 117 pounds for himself and did not pay appellant for it. Appellant located Cryer in Chiefland, Florida and shot him to death on February 20, 1991. Appellant hid out in Texas for about four weeks and then fled to Canada. About 16 months after the murder he was arrested in Canada on June 17, 1992. On June 15, 1992 a three-count indictment was returned against appellant in the Northern District of Florida and an order for arrest was issued on June 23, 1992. The counts of the indictment were for conspiracy to distribute marijuana, possession of marijuana and using a firearm ir connection with the foregoing. There followed almost five years of judicial proceedings in Canada regarding appellants extradition to the United States which ultimately took place in May of 1997.

On October 3, 1997, following defendant's extradition from Canada and his pleas of guilty first, to conspiring to distribute marijuana and to possess it with the intent to distribute it and second, to using and carrying a firearm in connection with the marijuana conspiracy, he was sentenced to 300 months imprisonment on the marijuana conspiracy charge and 60 months imprisonment consecutively on the firearm charge.

II. DISCUSSION

The marijuana conspiracy involved shipments of marijuana from Texas to Florida. In determining relevant conduct under the Sentencing Guidelines and in departing upward from the Guideline range the sentencing judge considered other marijuana dealings engaged in by the defendant beyond those to which he pleaded guilty, namely shipments to Louisiana. In departing from the Guideline range the sentencing court also relied on defendant's murder of Marty Cryer, the distributor of defendant's marijuana in Florida who had refused to pay his debt to defendant. There was abundant evidence before the sentencing judge to support the conclusion that defendant had murdered Cryer and had also been involved in marijuana shipments to Louisiana.

The only question before this court is whether consideration of these two courses of conduct in the sentencing (the murder and the Louisiana dealings) violated the provision in the *Treaty of Extradition Between the United States and Canada* that "[a] person extradited . . . shall not be detained, tried or punished . . . for an offense other than that for which extradition has been granted." As a question involving the interpretation of a treaty, this issue is subject to plenary review in this court. *United States v. Puentes*, 50 F.2d [sic] 1567, 1575 (11th Cir. 1995).

The principle thus stated in the treaty is known as the "doctrine of speciality."

The question must be resolved in accordance with the law of the United States. While the law and position of

the surrendering state may be considered, it is not controlling.

As it happens, Canada was well aware of the additional conduct ascribed to defendant and has acquiesced to the procedure by which such conduct is considered in sentencing. This court is therefore faced solely with the defendant's claim that his rights under the treaty were violated.

Stated differently, the question is whether the operation of the Sentencing Guidelines in this case caused defendant to be punished for any offenses other than the ones for which extradition was granted. The short answer is that defendant was not punished for crimes other than those for which he was extradited because under our law, the consideration of other conduct in the sentencing process is legally and conceptually a part of the punishment for the inducted [sic] crimes and within the limits set for those crimes.

The doctrine of speciality, as interpreted in our law, does not call for the extradition crime to be handled in a vacuum, in any of its phases. Thus, for example, an indictment in existence at the time of extradition can be lawfully superseded after extradition by an indictment charging larger quantities of drugs. *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995). *See also United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991); *United States v. Ross*, 545 F.2d 814 (2d Cir. 1976); *United States v. Barontian*, 299 F.2d 486 (2d Cir. 1961).

In the same vein, the doctrine of speciality does not control the evidentiary procedural rules of American Courts. For example, it is not violated by the admission of

evidence of crimes for which a defendant was not extradited if that evidence is relevant to the crime charged. Thus, evidence of money-laundering (for which extradition was specifically refused) was nevertheless admissible as evidence within the trial court's discretion for the purpose of proving a drug conspiracy (the crime for which extradition was granted). *United States v. Alvarey-Moreno,* 874 F.2d 1402, 1413-14 (11th Cir. 1989). Similarly, even in the face of a refusal by a foreign government to extradite for aiding and abetting a drug conspiracy under 18 U.S.C. § 2, the doctrine of speciality was held not to preclude the instruction of the jury on the theory of vicarious liability approved in *Pinkerton v. United States,* 328 U.S. 640 (1946), *United States v. Gallo-Chamarro,* 48 F.3d 502, 11th Cir. 1995.

With respect to the doctrine of speciality and U.S. law governing sentencing the doctrine of speciality does not restrict the scope of proof of other crimes that may be considered in the sentencing process. The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of speciality.

Appellant also challenges the District Court's enhancement of his sentence for obstruction of justice. The factual findings involved in such an enhancement are reviewed by this court for clear error. The application of the law to those factual findings is reviewed *de novo, United States v. Arguedas,* 86 F.2d [sic] 1054, 1059 (11th Cir. 1996). The sentencing court made this finding by stating that "it is clear to this Court beyond a reasonable doubt

this defendant did obstruct and attempt to obstruct justice by all of the activities following the murder,. . . . " The Court found the position of the probation office on the question of obstruction to be the correct one. That position advocated enhancement for 3 reasons; first the burying of the guns, second, the instruction to the secretary and third, the flight to Canada.

The factual and legal sufficiency of the destruction of evidence ordered by defendant is such that discussion of the burial of the guns and the flight to Canada is not needed.

The enhancement of a sentence for obstruction of justice is governed by Section 3C1.1 of the Sentencing Guidelines. Application Note 3 provides the following:

> destroying or concealing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting so to do; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender.

When appellant pled guilty the written factual basis acknowledged by him contained an account of how, after the murder of Cryer, he asked his secretary to go to his

apartment to remove money and cocaine and burn handwritten financial records, photographs of a man and a map showing locations in Florida. The government's discussion of these matters at the sentencing noted that these were photographs understood by the secretary to be of Cryer and a map understood by her to relate to his location.

Appellant makes a strained argument that his conduct did not amount to obstruction either because no federal investigation was underway or was not a hindrance because the investigation had abundant evidence from other sources.

These arguments are flimsy if not frivolous. There is no requirement that defendant's obstructive acts occur subsequent to the formal commencement of an investigation and we find no authority for that proposition. To the contrary, the modification of an attic to conceal a methamphetamine laboratory has been considered evidence of obstruction. *United States v. Query*, 928 F.2d 383, 386 (11th Cir. 1991).

In any event, the record shows that appellant was under investigation prior to the murder of Cryer, from at least the time two months earlier when police seized money sent to him as drug payments via Federal Express by Cryer's wife.

It is plain that the above quoted sentencing guidelines are not intended to create a formal date for the measurement of obstructive acts but rather, to distinguish those acts that are instinctively done in the heat of being caught engaged in the crime from those done before or after with cool calculation. Sending someone to destroy

evidence located elsewhere is clearly an obstructive act and the sentencing judge was fully justified in so finding whether or not it actually hindered an investigation. The "actual hinderance" test is only for those acts done at the time of arrest. *United States v. Rowlett*, 23 F.3d 300, 305-306 (10th Cir. 1994). In short, the key to a finding of obstruction is the intention of the actor, not the actual success of his obstructive acts. *United States v. Revel*, 971 F.2d 656, 660-661 (11th Cir. 1992) cert. denied in *Pullam v. United States*, 113 S. Ct. 1665; cert. denied, 113 S. Ct. 1828.

Appellant's final argument is that the sentencing court erred in finding that he had failed to show the acceptance of responsibility for his offense that would warrant a reduction under Sentencing Guidelines § 3E1.1. Such a showing is a defendant's burden. *United States v. Spraggins*, 868 F.2d 1541, 1543 (11th Cir. 1989). Appellant stresses his guilty plea as a demonstration of acceptance. But that falls far short of showing acceptance of responsibility in circumstances characterized by active avoidance of responsibility from the start to near the finish. The record is replete with evidence supporting the sentencing judges finding, ranging from the destruction of evidence, hiding out, living under an assumed name in Canada, to frivolous denials of overwhelming identification evidence after he was arrested there, and a frivolous claim in Canada that he was subject to a federal death penalty if extradited (after the only possible death penalty by the state of Florida had been waived). The appellant fell short of showing entitlement to a reduction for acceptance of responsibility merely because he ultimately pleaded guilty. App. Note 3 to § 3E1.1.

III. CONCLUSION

For the reasons given above, the sentence imposed in the judgment below is AFFIRMED and the appeal therefrom is denied.

United States District Court

Northern District of Florida at Gainesville

UNITED STATES OF AMERICA

v.

Edgar Arnold GARCIA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 3, 1997)

Case Number: 1:92CR01027-001

Thomas E. Miller, Gainesville, FL
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) I and III (on 7/25/97).
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B) & 846	Conspiracy to Possess With Intent to Distribute and Distribute Marijuana	02/28/1991	I
18 U.S.C. § 924(c)	Using and Carrying a Firearm During a Drug Trafficking Offense	02/20/1991	III

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) II is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 456-33-1607

Defendant's Date of Birth: 08/28/1960

Defendant's USM No.: 10753-017

Defendant's Residence Address:

Corpus Christi TX

Defendant's Mailing Address:
Unknown

Unknown NA

10/03/1997
Date of Imposition of Judgment

/s/ Maurice M. Paul
Signature of Judicial Officer

Maurice M. Paul
Senior U.S. District Judge
Name & Title of Judicial Officer

October 9, 1997
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **360 month(s)**.

Count I: 300 months.
Count III: 60 months, to run consecutive to sentence imposed in Count I.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m./p.m. on _____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 1-6-97 to FCC BEAUMONT USP at BEAUMONT, TX, with a certified copy of this judgment.

R.E. Holt, Warden

By Duane King, L.I.E.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 year(s).

Count I: 4 years
Count III: 3 years, to run concurrent with sentence imposed in Count I.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

(See additional conditions on Page 3A)

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not possess a firearm, dangerous weapon or destructive device.

The defendant shall provide the probation officer access to any requested financial information.

The defendant shall participate in a program of drug and/or alcohol testing, treatment and counseling as deemed necessary by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**	**$**	**$**

[ ] If applicable, restitution amount

ordered pursuant to plea agreement.... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Upon motion of the government, the Court excluded the inclusion of cocaine for purposes of determining the base offense level pursuant to §2D1.1. This change did not affect the guideline computations.

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: I

Imprisonment Range: 151 to 188 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 17,500.00 to $ 2,000,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):

See Additional Reasons for Departure From the Guideline Range – Page 7

The sentence as to Count I is a departure upward pursuant to the Policy Statement contained in §5K2.1(Death). The murder of Marty Cryer was an aggravating circumstance related to the offense of conviction within the meaning of §1B1.3. The defendant traveled from Texas because a customer, Marty Cryer, did not pay for a 117 pound marijuana shipment. The defendant and David Alley, armed with firearms confronted Marty Cryer at a motel in Chiefland, Florida, where the defendant shot Marty Cryer approximately nine times, resulting in Marty Cryer's death. The victim's wife and small daughter were in an adjacent motel room at the time of the murder. The sentencing guidelines did not take into account a murder such as this in formulating §2D1.1 (Offenses Involving Drugs). Guidelines §2D1.1(a)(2) provides for an offense level of 38 where death results from the use of drugs; and §2A1.1 provides for an offense level of 43 for First Degree Murder. The Court finds, based on the facts of this case, that an upward departure to an offense level 39 is justified.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3222-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Jun. 14, 2000)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___F.2d___).

Before: EDMONDSON and CARNES, Circuit Judges, and WATSON,* Senior Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

---

* Honorable James L. Watson, Senior Judge, United States Court of International Trade, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

IN THE UNITED STATES COURT OF APPEALS
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No. 97-3222-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

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* Honorable James L. Watson, Senior Judge, United States Court of International Trade, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

U.S. Const., Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CANADA

Extradition

Treaty signed at Washington December 3, 1971;
And agreement amending the treaty
Effected by exchange of notes
Signed at Washington June 28 and July 9, 1974;
Ratification of the treaty, as amended, advised by the Senate of the United States of America December 1, 1975;
Ratified by the President of the United States of America. December 12, 1975;
Ratified by Canada February 2, 1976;
Ratifications exchanged at Ottawa March 22, 1976;
Proclaimed by the President of the United States of America May 6, 1976;
Entered into force March 22, 1976.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty on Extradition between the United States of America and Canada was signed at Washington on December 3, 1971, as amended by an exchange of notes on June 28 and July 9, 1974, the original of which Treaty, as amended, is hereto annexed;

The Senate of the United States of America by its resolution of December 1, 1975, two-thirds of the Senators

present concurring therein, gave its advice and consent to ratification of the Treaty, as amended;

The Treaty was ratified by the President of the United States of America on December 12, 1975, in pursuance of the advice and consent of the Senate, and has been duly ratified on the part of Canada;

The respective instruments of ratification were exchanged at Ottawa on March 22, 1976;

It is provided in Article 18 of the Treaty that the Treaty shall enter into force upon the exchange of ratifications;

NOW, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the Treaty, as amended, to the end that it shall be observed and fulfilled with good faith on and after March 22, 1976, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of May in the year of our Lord one thousand nine hundred seventy-six and of the Independence of the United States of America the two hundredth.

[SEAL]

GERALD R. FORD

By the President:
JOSEPH JOHN SISCO
Acting Secretary of State

TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA

The United States of America and Canada, desiring to make more effective the cooperation of the two countries in the repression of crime by making provision for the reciprocal extradition of offenders, agree as follows:

ARTICLE 1

Each Contracting Party agrees to extradite to the other, in the circumstances and subject to the conditions describes in this Treaty, persons found in its territory who have been charged with, or convicted of, any of the offenses covered by Article 2 of this Treaty committed within the territory of the other, or outside thereof under the conditions specified in Article 3(3) of this Treaty.

ARTICLE 2

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed Schedule, or made

extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

ARTICLE 3

(1) For the purpose of this Treaty the territory of a Contracting Party shall include all territory under the jurisdiction of that Contracting Party, including air space and territorial waters and vessels and aircraft registered in that Contracting Party or aircraft leased without crew to a lessee who has his principal place of business, or, if the lessee as no such place of business, his permanent residence in, that Contracting Party if any such aircraft is in flight, or if any such vessel is on the high seas when the offense is committed. For the purposes of this Treaty an aircraft shall be considered in flight from the moment when power is applied for the purpose of the take-off until the moment when the landing run ends.

(2) In a case when offense 23 of the annexed Schedule is committed on board an aircraft at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, such offense and any other offense covered by Article 2 committed against passengers or crew of that aircraft in connection with such offense shall be considered to have been committed within the territory of a Contracting Party if the aircraft was registered in that Contracting Party, if the aircraft landed in the territory of that Contracting Party with the alleged offender still on board, or if the aircraft was

leased without crew to a lessee who has his principal place of business, or, if the lessee has no such place of business, his permanent residence in that Contracting Party.

(3) When the offense for which extradition has been requested has been committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall have the power to grant the extradition if the laws of the requested State provide for jurisdiction over such an offense committed in similar circumstances.

ARTICLE 4

(1) Extradition shall not be granted in any of the following circumstances:

(i) When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished in the territory of the requested State for the offense for which his extradition is requested.

(ii) When the prosecution for the offense has become barred by lapse of time according to the laws of the requesting State.

(iii) When the offense in respect of which extradition is requested is of a political character, or the person whose extradition is requested proves that the extradition request has been made for the purpose of trying or punishing him for an offense of the above-mentioned character. If any question arises as to whether a case comes

within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

(2) The provisions of subparagraph (iii) of paragraph (1) of this Article shall not be applicable to the following:

(i) A kidnapping, murder or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offense with respect to any such person.

(ii) When offense 23 of the annexed Schedule, or an attempt to commit, or a conspiracy to commit, or being a party to the commission of that offense, has been committed on board an aircraft engaged in commercial services carrying passengers.

ARTICLE 5

If a request for extradition is made under this Treaty for a person who at the time of such request, or at the time of the commission of the offense for which extradition is sought, is under the age of eighteen years and is considered by the requested State to be one of its residents, the requested State, upon a determination that extradition would disrupt the social readjustment and rehabilitation of that person, may recommend to the requesting State that the request for extradition be withdrawn, specifying the reasons therefor.

ARTICLE 6

When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 7

When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested State for an offense other than that for which extradition has been requested, his surrender may be deferred until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.

ARTICLE 8

The determination that extradition should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use all remedies and recourses provided by such law.

ARTICLE 9

(1) The request for extradition shall be made through the diplomatic channel.

(2) The request shall be accompanied by a description of the person sought, a statement of the facts of the case, the text of the laws of the requesting State describing the offense and prescribing the punishment for the offense, and a statement of the law relating to the limitation of the legal proceedings.

(3) When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or other judicial officer of the requesting State and by such evidence as, according to the laws of the requested State, would justify his arrest and committal for trial if the offense had been committed there, including evidence proving the person requested is the person to whom the warrant of arrest refers.

(4) When the request relates to a person already convicted, it must be accompanied by the judgment of conviction and sentence passed against him in the territory of the requesting State, by a statement showing how much of the sentence has not been served, and by evidence proving that the person requested is the person to whom the sentence refers.

ARTICLE 10

(1) Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in its territory or to prove that he is the identical person convicted by the courts of the requesting State.

(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when, in the case of a request emanating from Canada, they are authenticated by an officer of the Department of Justice of Canada and are certified by the principal diplomatic or consular officer of the United States in Canada, or when, in the case of a request emanating from the United States, they are authenticated by an officer of the Department of State of the United States and are certified by the principal diplomatic or consular officer of Canada in the United States.

ARTICLE 11

(1) In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. Such application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested State.

(2) On receipt of such an application the requested State shall take the necessary steps to secure the arrest of the person claimed.

(3) A person arrested shall be set at liberty upon the expiration of forty-five days from the date of his arrest

pursuant to such application if a request for his extradition accompanied by the documents specified in Article 9 shall not have been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

ARTICLE 12

(1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted nor be extradited by that State to a third State unless:

(i) He has left the territory of the requesting State after his extradition and has voluntarily returned to it;

(ii) He has not left the territory of the requesting State within thirty days after being free to do so; or

(iii) The requested State has consented to his detention, trial, punishment for an offense other than that for which extradition was granted or to his extradition to a third State, provided such other offense is covered by Article 2.

(2) The foregoing shall not apply to offenses committed after the extradition.

ARTICLE 13

(1) A requested State upon receiving two or more requests for the extradition of the same person either for

the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought.

(2) Among the matters which the requested State may take into consideration are the possibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the dates upon which the requests were received and the provisions of any extradition agreements between the requested State and the other requesting State or States.

ARTICLE 14

(1) The requested State shall promptly communicate to the requesting State through the diplomatic channel the decision on the request for extradition.

(2) If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested State within such time as may be prescribed by the laws of that State, he may be set at liberty and the requested State may subsequently refuse to extradite that person for the same offense.

ARTICLE 15

(1) To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered to the requesting State if extradition is granted.

(2) Subject to the qualifications of paragraph (1) of this Article, the above-mentioned articles shall be returned to the requesting State even if the extradition, having been agreed to, cannot be carried out owing to the death or escape of the person sought.

ARTICLE 16

(1) The right to transport through the territory of one of the Contracting Parties a person surrendered to the other Contracting Party by a third State shall be granted on request made through the diplomatic channel, provided that conditions are present which would warrant extradition of such person by the State of transit and reasons of public order are not opposed to the transit.

(2) The Party to which the person has been extradited shall reimburse the Party through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 17

(1) Expenses related to the transportation of the person sought to the requesting State shall be paid by the requesting State. The appropriate legal officers of the State in which the extradition proceedings take place shall, by all legal means within their power, assist the requesting State before the respective judges and magistrates.

(2) No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought

under the terms of this Treaty, shall be made by the requested State against the requesting State.

ARTICLE 18

(1) This Treaty shall be ratified and the instruments of ratification shall be exchanged at Ottawa as soon as possible.

(2) This Treaty shall terminate and replace any extradition agreements and provisions on extradition in any other agreement in force between the United States and Canada; except that the crimes listed in such agreements and committed prior to entry into force of this Treaty shall be subject to extradition pursuant to the provisions of such agreements.

(3) This Treaty shall enter into force upon the exchange of ratifications.[1] It may be terminated by either Contracting Party giving notice of termination to the other Contracting Party at any time and the termination shall be effective six months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Treaty.

DONE in duplicate, in the English and French languages, each language version being equally authentic, at Washington this third day of December, one thousand nine hundred seventy one.

---

[1] Mar. 22, 1976.

FOR THE UNITED STATES OF AMERICA:

/s/ William P. Rogers[1]

FOR CANADA:

/s/ Mitchell Sharp[2]

SCHEDULE

1. Murder; assault with intent to commit murder.
2. Manslaughter.
3. Wounding; maiming; or assault occasioning bodily harm.
4. Unlawful throwing or application of any corrosive substances at or upon the person of another.
5. Rape; indecent assault.
6. Unlawful sexual acts with or upon children under the age specified by the laws of both the requesting and requested States.
7. Willful nonsupport or willful abandonment of a minor when such minor is or is likely to be injured or his life is or is likely to be endangered.
8. Kidnapping; child stealing; abduction; false imprisonment.
9. Robbery; assault with intent to steal.
10. Burglary; housebreaking.

---

[1] William P. Rogers

[2] Mitchell Sharp

11. Larceny, theft or embezzlement.

12. Obtaining property, money or valuable securities by false pretenses or by threat of force or by defrauding the public or any person by deceit or falsehood or other fraudulent means, whether such deceit or falsehood or any fraudulent means would or would not amount to a false pretense.

13. Bribery, including soliciting, offering and accepting.

14. Extortion.

15. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

16. Fraud by a banker, agent, or by a director or officer of any company.

17. Offenses against the laws relating to counterfeiting or forgery.

18. Perjury in any proceeding whatsoever.

19. Making a false affidavit or statutory declaration for any extrajudicial purpose.

20. Arson.

21. Any act done with intent to endanger the safety of any person travelling upon a railway, or in any aircraft or vessel or other means of transportation.

22. Piracy, by statute or by law of nations; mutiny or revolt on board a vessel against the authority of the captain or commander of such vessel.

23. Any unlawful seizure or exercise of control of an aircraft, by force or violence or threat of force or violence, or by any other form of intimidation, on board such aircraft.

24. Willful injury to property.

25. Offenses against the bankruptcy laws.

26. Offenses against the laws relating to the traffic in, production, manufacture, or importation of narcotic drugs, Cannabis sativa L., hallucinogenic drugs, amphetamines, barbiturates, cocaine and its derivatives.

27. Use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses.

28. Offenses against federal laws relating to the sale or purchase of securities.

29. Making or having in possession any explosive substance with intent to endanger life, or to cause severe damage to property.

30. Obstructing the course of justice in a judicial proceeding, existing or proposed, by:

    a) dissuading or attempting to dissuade a person by threats, bribes, or other corrupt means from giving evidence;

    b) influencing or attempting to influence by threat, bribes, or other corrupt means a person in his conduct as a juror; or

    c) accepting a bribe or other corrupt consideration to abstain from giving evidence or to do or to refrain from doing anything as a juror.

[AMENDING AGREEMENT]

The Canadian Ambassador to the Secretary of State

(LOGO)

Canadian Embassy *Ambassade du Canada*

Washington, D.C.
June 28, 1974

No. 126

Excellency,

I have the honour to refer to the Treaty on Extradition between the Government of Canada and the Government of the United States signed at Washington on December 3, 1971 and to subsequent discussions between representatives of our two governments concerning the amendment of the said Treaty.

Further to those discussions I now have the honour to propose that the said Treaty be amended as follows:

(1) That Article 4(2)(i) of the Treaty shall be amended to read: "A kidnapping, murder, or other assault against the life or physical integrity of a person to whom a Contracting Party has the duty according to international law to give special protection, or any attempt or conspiracy to commit, or being a party to the commission of, such an offence with respect to any such person."

(2) That clause 26 of the Schedule annexed to the Treaty shall be amended to read: "Offences against the laws relating to the traffic in, production, manufacture or importation of drugs listed in Schedule I to the Single Convention on

Narcotic Drugs of March 30, 1961[1] and of drugs listed in Schedules I, II and III to the Convention on Psychotropic Substances of February 21, 1971."

If this proposal meets with the approval of your government, I have the further honour to propose that this Note, which is authentic in English and in French, and your reply shall constitute an amendment to the Treaty on Extradition between Canada and the United States referred to above, which shall come into force on the date of the entry into force of the said Treaty and which shall be considered an integral part of the said Treaty.

Accept, Excellency, the assurances of my highest consideration.

/s/ M. Cadieux
M. Cadieux,
Ambassador.

The Secretary of State to the Canadian Ambassador

DEPARTMENT OF STATE
WASHINGTON

July 9, 1974

Excellency:

I have the honor to refer to your note of June 28, 1974, in the English and French languages, relating to amendment of the Treaty on Extradition between the United States of America and Canada, signed at Washington December 3, 1971.

---

[1] TIAS 6298; 18 UST 1559.

On behalf of the United States of America I confirm the understanding set forth therein and consider that your note and this reply constitute an agreement between the United States and Canada on this matter.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:

Acting Secretary

/s/ Joseph John Sisso

His Excellency

Marcel Cadieux,

Ambassador of Canada.

CANADA – UNITED STATES: PROTOCOL AMENDING THE TREATY ON EXTRADITION*

[Done at Ottowa, January 11, 1988]

+Cite as 27 I.L.M. 422 (1988)+

I.L.M. Content Summary

[Preamble]

Art. I [Replaces Art. 2 of the Treaty: Offense is extraditable punishable by imprisonment for more than one year in both countries (dual criminality); fiscal crimes are extraditable]

Art. II [Deletes the "SCHEDULE" of the Treaty]

Art. III [Replaces Art. 3, para. 2, of the Treaty: The requested country has discretion to extradite for a crime committed outside the requesting country's territory, even though requested country's laws would not confer jurisdiction a similar crime (dual jurisdiction)]

Art. IV [Replaces Art. 4 of the Treaty: List of offenses that cannot be classified as "political offenses"]

Art. V [Replaces Art. 7 of the Treaty: Extradition may be delayed until the conclusion of unrelated criminal proceedings against the defendant in the requested country]

Art. VI [Replaces Art. 11, para. 3, of the Treaty: Extradition request and required documents must be received within 60 days after defendant has been arrested for the purpose of extradition;

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*[Reproduced from the text provided to *International Lega Materials* by the Canadian Department of External Affairs. Excerpt from the Treaty on Extradition, done at Washingotn, December 3 1971, appear at 11 I.L.M. 22 (1972).]

after 60 days, the defendant may be released without prejudice to the requesting country]

Art. VII [Amends Art. 17 of the Treaty: Factors for the request country to consider in deciding whether to extradite or prosecute]

Art. VIII [This agreement applies to all prospective requests regardless of when the related offense was committed (retroactivity)]

Art. IX [Entry into force upon exchange of instruments of ratification]

[Done at Ottowa on 11 January 1988]

[Signatures]

EXCHANGE OF LETTERS
BETWEEN THE U.S. AND CANADA
CONCERNING THE 11 JANUARY 1988 PROTOCOL
TO THE EXTRADITION TREATY

[Letter from the U.S. Secretary of State to the Canadian Secretary of State for External Affairs, dated 11 January 1988]

[The U.S. will cooperate in extraditing civilian "bounty hunters" who commit transborder abductions of persons from Canadian territory; but this proposal creates no rights or duties in either party]

[Letter from the Canadian Secretary of State for External Affairs to the U.S. Secretary of State, dated 11 January 1988]

[Acknowledging and accepting the U.S. proposal]

PROTOCOL AMENDING THE TREATY ON EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND CANADA SIGNED AT WASHINGTON ON DECEMBER 3, 1971, AS AMENDED BY AS EXCHANGE OF NOTES ON JUNE 28 AND JULY 9, 1974

The Government of the United States of American and the Government of Canada:

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at Washington on December 3, 1971, as amended by the agreement effected by an Exchange of Notes on June 28 and July 9, 1974 (hereinafter referred to as "the Extradition Treaty");

Have agreed as follows:

ARTICLE 1

Article 2 of the Extradition Treaty is deleted and replaced by the following:

"Article 2

(1) Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.

(2) An offense is extraditable notwithstanding

(i) that conduct such as interstate transportation or use of the mails or of other facilities affecting interstate or foreign commerce, required for

the purpose of establishing jurisdiction, forms part of the offense in the United States, or

(ii) that it relates to taxation or revenue or is one of a purely fiscal character."

ARTICLE II

The SCHEDULE to the Extradition Treaty, as amended, is deleted.

ARTICLE III

Paragraph (2) of Article 3 of the Extradition Treaty is deleted. Paragraph (3) of Article 3 of the Extradition Treaty is amended to read as follows:

"(2) When the offense for which extradition is requested was committed outside the territory of the requesting State, the executive or other appropriate authority of the requested State shall grant extradition if the laws of the requested state provide for jurisdiction over such an offense committed in similar circumstances. If the laws in the requested State do not so provide, the executive authority in the requested State may, in its discretion, grant extradition."

ARTICLE IV

Paragraph (2) of Article 4 of the Extradition Treaty, as amended, is deleted and replaced by the following:

"(2) For the purpose of this Treaty, the following offenses shall be deemed not to be offenses within subparagraph (iii) of paragraph 1 of this Article:

(i) An offense for which each Contracting Party has the obligation pursuant to a multilateral

international agreement to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution;

(ii) Murder, manslaughter or other culpable homicide, malicious wounding or inflicting grievous bodily harm;

(iii) An offense involving kidnapping, abduction, or any form of unlawful detention, including taking a hostage;

(iv) An offense involving the placing or use of explosives, incendiaries or destructive devices or substances capable of endangering life or of causing grievous bodily harm or substantial property damage; and

(v) An attempt or conspiracy to commit, or counselling the commission of, any of the foregoing offenses, or aiding or abetting a person who commits or attempts to commit such offenses."

ARTICLE V

Article 7 of the Extradition Treaty is deleted and replaced by the following:

"Article 7

When the person sought is being proceeded against or is serving a sentence in the requested State for an offense other than that for which extradition is requested, the requested State may surrender the person sought or postpone surrender until the conclusion of the proceedings or the service of the whole or any part of the sentence imposed."

ARTICLE VI

Paragraph (3) of Article 11 of the Extradition Treaty is deleted and replaced by the following:

"(3) A person arrested shall be set at liberty upon the expiration of sixty days from the date of arrest pursuant to such application if a request for extradition and the documents specified in Article 9 have not been received. This stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request and documents are subsequently received."

ARTICLE VII

The Extradition Treaty is amended by adding the following after Article 17:

"Article 17 bis

If both contracting Parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State, after consulting with the executive authority of the requesting State, shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:

(i) the place where the act was committed or intended to be committed or the injury occurred or was intended to occur;

(ii) the respective interests of the Contracting Parties;

(iii) the nationality of the victim or the intended victim; and

(iv) the availability and location of the evidence."

ARTICLE VIII

Notwithstanding paragraph (2) of Article 18 of the Extradition Treaty, this Protocol shall apply in all cases where the request for extradition is made after its entry into force regardless of whether the offense was committed before or after that date.

ARTICLE IX

(1) This Protocol shall be subject to ratification in accordance with the applicable procedures of the Government of the United States and the Government of Canada and instruments of ratification shall be exchanged as soon as possible.

(2) The Protocol shall enter into force upon the exchange of instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE in duplicate at Ottowa, this 11th day of January 1988, in the English and French languages, the two texts being equally authentic.

/s/ George P. Shultz
FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

/s/ Joe Clark
FOR THE GOVERNMENT OF CANADA

EXCHANGE OF LETTERS CONSTITUTING AN UNDERSTANDING BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE UNITED SATES OF AMERICA CONCERNING THE PROTOCOL AMENDING THE TREATY ON EXTRADITION SIGNED AT OTTAWA ON JANUARY 11, 1988

THE SECRETARY OF STATE
WASHINGTON

January 11, 1988

Dear Mr. Minister:

I refer to the Protocol Amending the Treaty on Extradition between the United States and Canada we signed today and have the honor to address to you the following.

The United States and Canada recognize that the transborder abduction of persons found in Canada to the United States of America by civilian agents of bail bonding companies, so-called "bounty hunters", is an extraditable offense under the United States – Canada Extradition Treaty.

Where a person has been charged with or convicted of such an offense in Canada and is found within the jurisdiction of the United States, the United States agrees, upon request, to commence extradition proceedings against such a person pursuant to the Treaty in order that the person may be returned to Canada.

The United States will use its best efforts to honor Canadian requests for testimony, information, or other assistance pertaining to such abductions.

Canada and the United States agree to cooperate to deter such transborder abductions. To assist in achieving that purpose, the United States will continue to exert its best efforts to inform those engaged in business as bail bondsmen or bounty hunters and other interested parties of the positions set forth in this exchange of letters.

The Right Honorable
Joe Clark, P.C., M.P.,
Secretary of State
For External Affairs of Canada,
Ottawa.

Canada and the United States agree to consult promptly concerning any case of transborder abduction involving bounty hunters which might arise in the future. The purpose of such consultations shall be to address matters relating to any such case, including any request by the Government of Canada for the return of the person so abducted. In the event of return, the Governments agree to co-operate to have the abducted person escorted to Canada and taken into custody at the border, pursuant to a request for provisional arrest, pending the outcome of extradition proceedings. For the purpose of these consultations, the principal law enforcement contact for the United States will be the Director of the Office of International Affairs of the Criminal Division of the Department of Justice.

I have the honor to propose that this letter and your reply constitute an understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create

or otherwise alter any rights or privileges for private parties.

Sincerely yours,

/s/ George P. Shultz
George P. Shultz

For Him, Joe Clark, P.C., M.D.
Scy. of State for External Affairs

He tries hon. Joe Clark, C.P.
depute Secretaire d Etat
aux Affaires exterieures

Canada

Ottawa, January 11, 1988

ILA-0026

Dear Mr. Secretary:

I have the honour to acknowledge receipt of your letter of today's date concerning transborder abduction of persons found in Canada to the United States of American by civilian agents of bail bonding companies, so-called "bounty hunters". I accept your proposal that your letter and this reply constitute an Understanding between our two Governments which is not intended to create or otherwise alter legal obligations for either Government nor to create or otherwise alter any rights or privileges for private parties.

Yours sincerely,

/s/ George P. Shultz

The Honourable George P. Shultz
Secretary of the State of the
United States of America

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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18 U.S.C. § 924(c):

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

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21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment

which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in

subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an

individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final,

such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. –

(A) In general. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub. L. 98-473, title II, Sec. 224(a)(2), formerly Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, Sec. 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that

the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any

action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

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21 U.S.C. Sec. 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S. Department of Justice

[SEAL]

Criminal Division

Washington D.C. 20530
October 2, 1997

Via Facsimile

Michael Simpson, Esq.
Assistant United States Attorney
Northern District of Florida
315 S. Calhoun Street
Suite 510
Tallahassee, Florida 32301

Dear Mr. Simpson:

Re: Extradition from Canada of Edgar A. Garcia

I am writing to confirm that on October 1, 1997, I discussed the *Garcia* case with Kimberly Prost, Director of the International Assistance Group (IAG) within the Department of Justice in Ottawa, Canada. Ms. Prost's office works closely with the Office of International Affairs (OIA) to facilitate law enforcement cooperation between the United States and Canada, particularly in the areas of extradition and mutual legal assistance. Attorneys in IAG and OIA assisted in the effort to extradite Edgar A. Garcia to the United States.

Earlier this week, you advised me that Mr. Garcia had filed motions contesting your intent to introduce certain evidence at his sentencing on October 3, 1997, on the basis that use of this evidence would violate Article 12 of the extradition treaty between the United States and

Canada. The Rule of Specialty contained in Article 12 states that, "(1) A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted . . . " absent three specified conditions. Ms. Prost and I discussed this issue in our telephone conversation. Ms. Prost stated her opinion that your intention to seek a sentence that exceeds the sentencing guidelines does not violate the Rule of Specialty, provided that the potential sentence was within the range of penalties included in the package of documents presented to Canada in support of your request for Mr. Garcia's extradition, and the underlying facts you use in your argument to the court were likewise set out in the extradition documents.

I hope this information is useful to you.

Sincerely,

Frances Fragos Townsend
Director
Office of International Affairs

By:
/s/ Lisa C. Burnett
Lisa C. Burnett
Associate Director

cc: Kimberly Prost

(2)

Supreme Court, U.S.
FILED
NOV 24 2000

No. 00-463

In the Supreme Court of the United States

EDGAR ARNOLD GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner in accordance with 21 U.S.C. 841(b)(1)(A), in the absence of an allegation as to drug quantity in the indictment.

2. Whether the district court committed reversible error by sentencing petitioner according to the quantity of drugs for which he was responsible under the Sentencing Guidelines and for departing upward from the Guidelines sentencing range because a death had resulted from his conduct, in the absence of allegations as to those facts in the indictment.

3. Whether the doctrine of specialty, under which an extradited defendant may be prosecuted only for the crimes for which he was extradited, precludes the use of facts regarding other crimes in setting the defendant's sentence.

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In the Supreme Court of the United States

No. 00-463

EDGAR ARNOLD GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 208 F.3d 1258.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on June 14, 2000. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on September 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiring to possess marijuana with

intent to distribute it, in violation of 21 U.S.C. 846, and using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Pet. App. 10a-11a. He was sentenced to 300 months' imprisonment for the marijuana conspiracy offense and a consecutive 60 months' imprisonment for the firearm offense. *Id.* at 12a. The court of appeals affirmed. *Id.* at 1a-9a.

1. In 1990, petitioner was a principal organizer of a conspiracy to supply marijuana from Texas to co-conspirators in Florida. One of the co-conspirators, Marty Cryer, appropriated about 117 pounds of marijuana for himself and did not pay petitioner for it. Petitioner located Cryer in Chiefland, Florida, and shot him to death on February 20, 1991. Petitioner hid in Texas for about four weeks and then fled to Canada. Pet. App. 2a.

On June 17, 1992, petitioner was indicted in the Northern District of Florida for conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a), and using and carrying a firearm during and in relation to a drug trafficking offenses, in violation of 18 U.S.C. 924(c). The indictment specified that marijuana was the controlled substance involved in the drug trafficking offenses, but it did not specify the quantity of marijuana, nor did it refer to 21 U.S.C. 841(b), which provides for increased sentence maximums depending on drug quantity. See Gov't C.A. Br. App. Item No. 1, at 1-2. On June 23, 1992, the district court issued a warrant for petitioner's arrest. Pet. App. 2a. Florida state prosecutors also charged petitioner with first degree murder for the death of Cryer. Gov't C.A. Br. 5.

2. On June 17, 1992, petitioner was arrested in Canada by Canadian authorities. Pet. App. 2a. On August 12, 1992, the United States made a formal request to Canada for extradition of petitioner to face prosecution on the charges included in the federal indictment, as well as on the state murder charge. Gov't C.A. Br. 5; Pet. App. 2a. The extradition request specifically recited that petitioner was exposed to imprisonment for up to 40 years under 21 U.S.C. 841(b)(1)(B) for his federal drug conspiracy offense, because it involved more than 100 kilograms of marijuana. Gov't C.A. Br. App. Item No. 1, at 5 (affidavit accompanying extradition request).

In May 1997, after approximately five years of extradition proceedings in Canada, petitioner was extradited. Pet. App. 2a. The extradition was authorized on both the federal and state charges, based on a stipulation by the State of Florida that it would not seek the death penalty for the murder charge. Gov't C.A. Br. 5-6.

3. On July 25, 1997, pursuant to a plea agreement, petitioner pleaded guilty in federal district court to the marijuana conspiracy and firearm offenses charged in the federal indictment. The plea agreement specifically recited that petitioner was exposed to up to 40 years' imprisonment for the marijuana conspiracy charge under 21 U.S.C. 841(b)(1)(B) and to a consecutive five years' imprisonment for the firearm charge. Gov't C.A. Br. 6-7. At the plea hearing, the government filed a document entitled "Factual Basis For Plea," and petitioner acknowledged that the government could present evidence showing that the drug conspiracy entailed far more than the 100 kilogram threshold to invoke that penalty provision. *Id.* at 7. The acknowl-

edged testimony also established petitioner's guilt of Cryer's murder. *Id.* at 8-11.

The district court had the factual basis for the plea read into the record. Gov't C.A. Br. 13. Under oath, petitioner acknowledged that the stated facts were true, except that there were some items of which he had no knowledge. *Ibid.* He admitted his guilt of the federal charges, but declined to address his culpability for Cryer's murder. *Ibid.* Petitioner specifically acknowledged that he understood the penalties to which he was exposed. *Ibid.*

The presentence report (PSR) recommended a base offense level of 28, based upon 1,100 pounds of marijuana and one kilogram of cocaine that were involved in the conspiracy offense and other relevant conduct. Gov't C.A. Br. 14. The PSR also recommended a two-level upward adjustment for obstruction of justice and denial of any credit for acceptance of responsibility. *Id.* at 13-14. The district court overruled petitioner's objections to the PSR and found the PSR to be accurate, with the exception of the cocaine allegation, which was deleted at the government's request. *Id.* at 19. The court found that the sentencing range was 151-188 months' imprisonment. *Ibid.* The court granted the government's request for an upward departure based on Cryer's murder in connection with the drug trafficking conspiracy. *Ibid.* It imposed a sentence of 300 months' imprisonment for the drug conspiracy offense and a consecutive 60 months' imprisonment for the firearm offense. *Ibid.* The court rejected petitioner's claims that the terms of his extradition and the doctrine of specialty precluded the court's consideration at sentencing of either the murder or quantities of marijuana sent from Texas to Louisiana (rather than Florida) as part of the conspiracy. *Id.* at 14-15, 19.

On October 9, shortly after the federal sentencing, petitioner pleaded guilty to second degree murder in Florida state court, pursuant to a plea agreement, and was sentenced to 17 years' imprisonment, to run concurrently with the federal sentence. Pet. 3. At the time the federal district court imposed its sentence, it was aware of petitioner's intent to plead guilty to the state murder charge. Gov't C.A. Br. 14 & n.1.

4. The court of appeals affirmed the district court's sentence. Pet. App. 1a-9a. It rejected petitioner's claim that the conditions of petitioner's extradition precluded the district court from considering as relevant conduct or as grounds for departure either the murder or the shipments of marijuana from Texas to Louisiana, for which petitioner was responsible. *Id.* at 3a-5a. The court recognized that the "doctrine of specialty" protected an extradited person from being prosecuted or punished "for an offense other than that for which extradition has been granted." *Id.* at 3a. But it held that the rule was not violated in this case, because petitioner was prosecuted, convicted, and punished only for the offenses for which extradition was granted. *Id.* at 5a. The court ruled that, when it extradited petitioner, "Canada was well aware of the additional conduct ascribed to [petitioner] and has acquiesced to the procedure by which such conduct is considered in sentencing." *Id.* at 4a. (The court had been advised in the briefing that the Canadian Government had been consulted in petitioner's case and that it had no objection to the district court's consideration of the various facts and circumstances at sentencing. See Gov't C.A. Br. 32-33.) In any event, the court of appeals held that "[t]he question must be resolved in accordance with the law of the United States [although] the law and position of the surrendering

state [Canada] may be considered." Pet. App. 3a-4a. The court found that the doctrine of specialty, as applied by United States courts, was not violated by the sentencing approach taken by the district court, relying on cases establishing that an indictment may be amended after extradition to increase the drug quantity involved and that a court may admit evidence of non-extradited offenses at a trial on extradited offenses. *Id.* at 4a-5a. The court concluded that the doctrine of specialty "does not restrict the scope of proof of other crimes that may be considered in the sentencing process." *Id.* at 5a.[1]

DISCUSSION

1. Petitioner contends (Pet. 22-23), for the first time in this Court, that the 360-month sentence on the drug count was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the indictment did not allege the quantity of drugs involved in his offense. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner was convicted of a drug offense that was subject to sentencing in accordance with the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's 360-month sentence is authorized by Section 841(b)(1)(B), which provides that, where the offense involves a particular threshold quantity of a controlled substance

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[1] The court of appeals also rejected petitioner's claims—not reasserted here—that the district court erred in enhancing his offense level for obstruction of justice and in denying acceptance of responsibility credit. Pet. App. 5a-8a.

(here, 100 kilograms or more of marijuana), the defendant shall be sentenced to a term of imprisonment "which may not be less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Petitioner's sentence is not authorized, however, by Section 841(b)(1)(D), which provides a term of imprisonment of "not more than 5 years" for a drug offense involving any quantity of marijuana up to 50 kilograms. Thus, the sentence imposed on petitioner for possession of a controlled substance with intent to distribute it depended on an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved more than 100 kilograms of marijuana) that was not alleged in the indictment.

In *Apprendi*, this Court stated that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 120 S. Ct. at 2365 n.19. Although this case involves a guilty plea rather than a jury verdict,[2] and *Apprendi* did not decide whether facts that enhance a statutory maximum sentence must be charged in the indictment,[3] the court of appeals should be afforded the opportunity in the first instance to determine whether imposition of a sentence above five years in this case on

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[2] *Apprendi* itself also involved a guilty plea to underlying offenses, followed by a penalty enhancement proceeding. See *Apprendi*, 120 S. Ct. at 2352.

[3] *Apprendi*, which involved a challenge to a state conviction, did not present any issue concerning whether a particular fact should have been alleged in an indictment. See *Apprendi*, 120 S. Ct. at 2355 n.3.

the basis of a drug quantity not alleged in the indictment is error under the rationale of *Apprendi*.

We note that, even assuming error in this case, petitioner is not automatically entitled to resentencing to a prison term of "not more than 5 years" pursuant to 21 U.S.C. 841(b)(1)(D) (1994 & Supp. IV 1998). He has never disputed, and does not now dispute, his responsibility for at least 100 kilograms of marijuana. To the contrary, petitioner's plea agreement specifically recited that petitioner was exposed to up to 40 years' imprisonment for the marijuana conspiracy charge under 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Gov't C.A. Br. 6-7. Moreover, at the plea hearing, petitioner acknowledged that the government could present evidence showing that the drug conspiracy entailed far more than the 100 kilogram threshold to invoke that penalty provision. *Id.* at 7. Petitioner has not sought, and does not now seek, dismissal of the indictment as defective. The appropriate disposition of this petition is therefore vacatur of the court of appeals' judgment and remand of the case for further consideration in light of *Apprendi* and plain error analysis. See *Johnson* v. *United States*, 520 U.S. 461 (1997).

2. Petitioner also argues (Pet. 8-23) that the district court's upward departure from the indicated sentence under the Sentencing Guidelines because of his murder of Cryer and the district court's use of a Guidelines range determined in part on the quantity of drugs attributed to petitioner violated *Apprendi*.

Contrary to petitioner's arguments (Pet. 20-21), there was no error under *Apprendi* in the application to petitioner of the Sentencing Guidelines. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory

minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct the judge * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards* v. *United States*, 523 U.S. at 515)). The Guidelines merely "channel the sentencing discretion of the district courts and make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guidelines range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Indeed, one of petitioner's complaints in this case is that the district court did not adhere to the Guidelines sentencing range, but instead used its departure authority. Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and

sentencing adjustments under (or departures from) the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards* v. *United States*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

3. Petitioner claims (Pet. 24-30) that it violated the conditions of his extradition from Canada for the district court to determine his sentence in part on the basis of facts regarding his murder of Cryer and his Louisiana drug dealing.

The rule or doctrine of specialty is the principle that a person who has been extradited cannot be tried or punished for an offense other than that for which he has been extradited, without the consent of the country from which he is extradited. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 659 (1992); *United States* v. *Rauscher*, 119 U.S. 407, 430 (1886). That limitation is specifically incorporated into Article 12 of the extradition treaty between Canada and the United States, which provides, that "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted." Pet. App. 36a.

In this case, petitioner was extradited for prosecution on federal drug and firearm offenses, as well as a state murder charge. He was tried, convicted, and punished in the federal court only for the drug and firearm offenses. It is a basic principle of sentencing that, when relevant uncharged conduct is considered in sentencing for an offense of conviction, the punishment imposed is punishment for the offense of conviction, not

for the uncharged conduct. The "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime with the authorized statutory limits does not constitute punishment" for the related criminal conduct. *Witte* v. *United States*, 515 U.S. 389, 399 (1995). That is why conduct of which a person has been acquitted may be considered at sentencing for another offense without violating due process or the Double Jeopardy Clause. See *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam).

Petitioner does not cite to any decision, and we have found none, holding that the above-quoted provision of the U.S./Canadian Extradition Treaty (or similar language in any other extradition treaty) limits a court's consideration at sentencing to conduct strictly encompassed by the extradited offenses. To the contrary, the few cases that have addressed this issue, apart from the instant case, have reached the same conclusion as the court below that the rule of specialty does not limit sentencing considerations for extradited offenses. See *United States* v. *Lazarevich*, 147 F.3d 1061 (9th Cir.) (upward departure from Guidelines range for extradited offense based on related non-extradited offense does not violate the rule of specialty), cert. denied, 525 U.S. 975 (1998); *Leighnor* v. *Turner*, 884 F.2d 385 (8th Cir. 1989) (Parole Commission's use of non-extradited conduct in calculating parole release date for extradited conduct did not violate rule of specialty).

Petitioner argues (Pet. 28) that, had he been sentenced in Canada for the drug conspiracy offense for which he was convicted in the federal district court, a Canadian court would not have considered his murder of Cryer or the uncharged drug trafficking activity in

sentencing for the offense of conviction.[4] But the rule of specialty has been understood, as petitioner himself states (Pet. 27), to prohibit prosecution in this country only if "the extraditing country would consider the offense actually tried 'separate.'" *United States* v. *Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962). That rule has never been applied to limit the factors that a court may consider in sentencing a defendant for the offenses for which he was lawfully extradited and tried.[5] In short, U.S. courts do not limit sentencing practices as petitioner claims Canada does, and U.S. courts have never interpreted the rule of specialty as precluding the application of usual sentencing practices.[6]

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[4] Petitioner does not cite to any Canadian legal authority for those propositions. His view of Canadian law, and its application to the extradition treaty, is undermined by the communication received in the district court (and included in the record in this case) from the Office of International Affairs of the Canadian Department of Justice. That letter stated that the considerations proposed for use in sentencing by the district court did not violate the rule of specialty. See Pet. App. 72a-73a.

[5] Petitioner's claim (Pet. 27) that "[t]he Eleventh Circuit's decision in this case stands in marked contrast to the test typically applied" is accordingly mistaken. The Eleventh Circuit correctly held (Pet. App. 9a) that the question "whether consideration [at sentencing] of these two courses of conduct (the murder and the Louisiana dealings) violated the provision in the [extradition treaty]" is one that "must be resolved in accordance with the law of the United States." That holding in no way conflicts with the principle of *Paroutian*, which has to do with determining the offenses for which a defendant can be tried, not what factors may be considered in determining a defendant's sentence.

[6] We also note that petitioner was extradited for trial and punishment for his murder of Cryer, albeit based on a state indictment. Even if the rule of specialty was otherwise applicable in this case, it would not seem to preclude consideration of the murder because that was an offense for which he was extradited.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him in accordance with 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998) in the absence of an allegation in the indictment that the drug quantity was greater than the 100 kilograms of marijuana necessary to sentence him under that provision, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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No. 00-463

In The

Supreme Court of the United States

EDGAR A. GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *APPRENDI V. NEW JERSEY*, 120 S.Ct. 2348 (2000), WHICH DICTATES THE CONCLUSION THAT UNCHARGED OFFENSES THAT INCREASE THE MAXIMUM SENTENCE APPLICABLE UNDER THE FEDERAL SENTENCING GUIDELINES ARE SEPARATE OFFENSES THAT MUST BE CHARGED IN THE INDICTMENT AND TRIED BEFORE A JURY..... 1

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ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (2000), WHICH DICTATES THE CONCLUSION THAT UNCHARGED OFFENSES THAT INCREASE THE MAXIMUM SENTENCE APPLICABLE UNDER THE FEDERAL SENTENCING GUIDELINES ARE SEPARATE OFFENSES THAT MUST BE CHARGED IN THE INDICTMENT AND TRIED BEFORE A JURY.

The Government's Brief miscomprehends Petitioner's claim with regard to drug quantities. Petitioner's brief does not explicitly raise the issue that the indictment charging him with a Florida drug offense should also have specified the amounts of marijuana involved in that offense. Ironically, the Government correctly suggests that this omission was erroneous. Petitioner agrees that this is one of the issues that should be addressed by the courts below on remand; however, remand should occur after this Court has addressed the other constitutional issues that are ripe for decision at this time.[1]

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[1] As the Government suggests, Petitioner's sentence should be vacated by this Court and remanded for resentencing by the district court consistent with *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). The Eleventh Circuit's recent decision in *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000), makes clear that Petitioner's sentence is unlawful under *Apprendi*. Like the defendant in *Rogers*, Petitioner was convicted of conspiring to commit a violation of 21 U.S.C. § 841(b)(1)(B), although the quantities of drugs with which Petitioner was charged with conspiring to possess were not stated in the indictment. The Eleventh Circuit has made clear that sentences such as

The thrust of Petitioner's argument is that the federal indictment in his case charged him only with drug offenses in the State of Florida and a related firearm charge, but he was sentenced not only for that offense, but also for an uncharged drug offense in the State of Louisiana and, more importantly, for an uncharged homicide. The Government correctly notes that this Court has

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Petitioner's are erroneous. *Rogers*, 228 F.3d at 1327 ("We hold today that drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt in light of *Apprendi*.") The court determined that with regard to cases on direct review, such as Petitioner's, "there is no doubt that [defendants] are entitled to the benefit of the rule announced in *Apprendi* and applied here." *Id.* at 1328.

The court also ruled that the remedy in this case is to sentence Petitioner without reference to drug quantity. *Id.* Therefore, consistent with the court's decision in *Rogers*, Petitioner should be resentenced in the district court. The Eleventh Circuit's decision in *Rogers* would make Petitioner punishable under section 841(b)(1)(C), which provides punishment for conviction of an undetermined amount of drugs and provides for punishment "of not more than 20 years". *Id.* Petitioner would argue that the correct remedy was applied by the Eighth Circuit's decision in *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000). That court held that "[a] conviction of marijuana based on an indictment that fails to attribute an amount of marijuana to the defendant or to indicate that the distribution was for remuneration . . . is subject to the maximum penalty of one year imprisonment found in 21 U.S.C. 841(b)(4)." *Id.* at 933.

Since Petitioner was previously sentenced under § 841(b)(1)(B) which provides for a 40 year statutory maximum, it is beyond peradventure that Petitioner's erroneous sentence meets the showing of substantial prejudice required to establish plain error on review.

upheld the constitutionality of the Federal Sentencing Guidelines as a system for sentencing. Moreover, Petitioner agrees with the Government that a sentencing court may, consistent with constitutional principles, exercise its discretion by taking into account aggravating and mitigating circumstances related to the offense of conviction. Petitioner thus agrees that, in general, the departure authority granted to district courts in the Guidelines comports with the Constitution.

Contrary to the Government's suggestion (Gov. 9-11), Petitioner does not levy a blanket attack against the constitutionality of the Guidelines or of the sentencing court's departure authority. Petitioner makes the more limited argument that the Fifth and Sixth Amendment, as interpreted by this Court in *Apprendi*, should be found to place some limit on the types of factors sentencing courts may take into account in exercising their departure authority.

The court below departed upward from the Guideline range prescribed for the charged offenses by *five levels* to take into account an uncharged, unadjudicated homicide. This departure represents an increase in Petitioner's sentence of over nine years. Moreover, the court also factored into the sentencing calculus drug quantities related to uncharged allegations in Louisiana. This uncharged offense raised Petitioner's sentence by another 2 1/2 years. In total, the uncharged offenses increased Petitioner's sentence by more than 11 years, from the 15-17 year range to 30 years.

As more fully developed in Petitioner's Brief, this Court should grant certiorari to consider whether district

courts may properly depart upward to punish for uncharged, unadjudicated murders as is encouraged in U.S.S.G. § 5K2.1 as well as an uncharged drug offense. The decision *Apprendi* distinguished between "sentencing factors" and "sentence enhancements," finding the latter to be "elements" of a greater offense that must be charged in the indictment and proven to a jury:

> This [holding] is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 120 S.Ct. at 2365 n. 19. The use of uncharged offenses goes beyond a separate "element" of a greater offense and permits punishment based on a whole cluster of elements that comprise the separate offense.

Moreover, should the Court grant the Petition, Petitioner would seek leave fully to brief the question of whether the district court incorrectly adjudged the uncharged Louisiana offenses as relevant conduct. Petitioner would argue that the court's finding violates this Court's decision in *Bluementhal v. United States*, 322 U.S. 539 (1947). As such, the consideration of this separate,

uncharged alleged offense also violates the dictates of *Apprendi v. New Jersey*.

II. THIS COURT SHOULD RESOLVE THE CONFLICT ON WHETHER THE LAW OF THE REQUESTING COUNTRY OR OF THE SURRENDERING COUNTRY GOVERNS IN DETERMINING WHETHER PUNISHMENT FOR AN OFFENSE INDEPENDENT OF THE EXTRADITION AGREEMENT HAS OCCURRED.

The Government confuses two separate issues in assessing Petitioner's arguments based on the specialty doctrine of international law. The first issue is whether punishing Petitioner for uncharged offenses not included in the extradition agreement violates the specialty doctrine and whether the law of the United States or Canada should be considered in making this determination. The second, separate issue is whether Canada has consented, or waived objections, to the sentencing practices followed in this case.

First, this Court should determine whether the uncharged offenses for which the district court imposed an increase in Petitioner's sentence of more than 11 years are "separate" offenses from those listed in the extradition request. On this question there is a divergence of practice between the courts of the United States and those of Canada. (Of course, Petitioner's first argument based on *Apprendi* asks this Court to bring the practices of the American federal courts more in line with those of Canadian courts.) Assuming that American law continues to allow the consideration of uncharged offenses at sentencing and that Canadian law prohibits this practice, the

legal issue then is whether courts in the United States should follow American law or Canadian law in sentencing a person who has been extradited under the Extradition Treaty between the United States and Canada. As argued here and in Petitioner's Brief, the traditional test considers the law of the extraditing state, not the requesting state, and the Eleventh Circuit's decision to the contrary should be reversed by this Court and remanded for a new sentencing hearing that permits consideration of Canadian law.

The Government faults Petitioner for not citing any Canadian legal authority for the proposition that his sentence would be considered unconstitutional under Canadian law. (Gov. Brief 12 n. 4). No substantial authority has been entered into the record because the district court refused to permit the testimony of Dean William Schabas, the Dean of the Law School at the University of Quebec in Montreal. Dean Schabas is a renown legal expert on Canadian criminal law and international law. Dean Schabas travelled from Canada to Florida to testify regarding the legal issues involved in the application of the speciality doctrine to Petitioner's sentence. Ironically, the Government objected to the proffer of this testimony, stating: "Your Honor, I cited Your Honor in the government's response to the sentencing memorandum the *Abello-Silva* case which holds that the interpretation of doctine of specialty is to be controlled by U.S. law not by Canadian law. The witness' expertise may be superb, but it's irrelevant." (Transcript of Sentencing Hearing 124). Agreeing with the Government, the court refused to hear from Dean Schabas, relying instead on a skeletal affadivit by Dean Schabas that had previously been submitted to

the court by Petitioner. The court concluded that Dean Schabas's summary statements regarding the specialty doctrine were "not the true state of the treaty." (Transcript of Sentencing Hearing 136.)

The court apparently concluded that American law alone dictates what factors or offenses may be taken into account at sentencing. The court stated in response to Petitioner's specialty doctrine objection: "The response by the government to that I think is certainly well founded and states the appropriate law that I follow." (Transcript of Sentencing Hearing 136).

The Eleventh Circuit upheld this ruling, stating: "The question must be resolved in accordance with the law of the United States. While the law and position of the surrendering state may be considered, it is not controlling." (Petitioner's Brief, App. 3-4). In other words, the Eleventh Circuit held that Canadian law may or may not be considered (apparently at the whim of the district courts), and, if it is inconsistent with American law, it can simply be ignored by the district courts.

As argued fully in Petitioner's Brief, the Eleventh Circuit is in error. The treaty states that the extradited person may not be "detained, tried *or punished*" by the requesting state for an offense other than that for which extradition has been granted. Whether the district court may be permitted to punish Petitioner for an uncharged homicide in federal court should be determined by reference to Canadian law, not simply American law. As Petitioner has argued in his Brief, the test adopted by all the Circuit Courts, with the exception of the Eleventh Circuit's decision in this case, is "whether the *extraditing*

country would consider the offense actually tried 'separate.' " *United States v. Paroutian*, 299 F.2d 486, 490-91 (2d Cir. 1962) (emphasis added). Thus, the test looks to the law of the extraditing country to determine the intent of the extraditing country in granting the extradition. The uncharged offenses for which Petitioner was punished at sentencing are not simply "sentencing factors" but separate offenses, and would so be viewed by Canadian courts. Moreover, the fact that Petitioner was punished by both the State of Florida and the Federal Court for the same homicide would violate Canadian double jeopardy principles. Thus, Petitioner's sentence violates the specialty doctrine of the extradition treaty.

The Government suggests that the rule of specialty only applies to offenses for which a person is "tried", relying on the language in the traditional test in *Paroutian*. (Gov. Brief at 12 n. 5). On this point, the Government is simply wrong. The traditional specialty doctrine test refers to offenses for which a person is "tried" or "prosecuted" (as opposed to "punished") because specialty doctrine challenges have generally challenged additional charges added by means of superseding indictments. Petitioner's argument, challenging the practices authorized by the Federal Sentencing Guidelines, is one of first impression. Since there are no previous challenges to the procedure for punishing an individual, it should come as no surprise that there is no case law that speaks to the question of being "punished" for a charge not listed in the extradition agreement. Of course, the treaty makes no distinction and forbids a person from being "detained, tried, *or punished*" for an offense not included in the extradition agreement.

The second issue raised is whether the country of Canada has consented, or waived objections, to the sentencing practices in this case. As Petitioner's Brief argues, Canada has sent no written consent or waiver of objections through diplomatic channels, so as specifically to permit the punishment of Petitioner for offenses other than those listed in the extradition agreement. Apparently prompted by Petitioner's specialty doctrine objection made in the district court, the Government obtained a letter written by an American official in the U.S. Department of Justice stating that she had had a telephone conversation with a counterpart in the Canadian Department of Justice in which the Canadian counterpart stated "her opinion" that the sentencing practices would not violate the specialty doctrine. Based solely on this unofficial personal opinion of a law enforcement official relayed by telephone, the Eleventh Circuit concluded that the country of Canada "has acquiesced to the procedure by which such conduct is considered in sentencing." (Pet. App. at 4).

This Court need not reach the question of what requirements must be met to qualify as an official consent or waiver of objections by a foreign country. However, this Court should find that a verbal statement of personal opinion of a lower-level law enforcement official does not suffice to constitute an official statement by a sovereign country waiving objections regarding the interpretation of a treaty. Indeed, treaties are the supreme law of the land. For this reason, extradition treaty matters – like other important matters of foreign policy – are handled by the highest officials of the Department of State in

written documents transmitted through official diplomatic channels.

In short, the country of Canada has not forwarded any written statement consenting to the sentencing practices in this case, nor was there any indication in the extradition agreement that the federal court intended to take into account the State homicide charge or any drug offense allegations in Louisiana in punishing Petitioner. Thus, there is absolutely no basis for a finding that the country of Canada has agreed to waive objections to the sentencing practices followed in this case.

Respectfully submitted,

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